FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1828

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNION PACIFIC RAILROAD CO., ET AL., PETITIONERS

v.

DENNIS COHN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1828

UNION PACIFIC RAILROAD CO., ET AL., PETITIONERS

v.

DENNIS COHN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

---

1. Respondents brought this action against petitioner Union Pacific, their employer, in the United States District Court for the District of Nebraska, seeking an award of back pay and seniority credit under the Vietnam Era Veterans' Readjustment Act of 1974, 88 Stat. 1594, as amended, 38 U.S.C. (Supp. V) 2021 *et seq.*[1]

Respondents were employed as "Rule 154 carmen" with Union Pacific when they left to enter military service.[2] Under the applicable collective bargaining agreement, a Rule 154 carman attains journeyman status (with its journeyman's seniority date and added protection

---

[1]Formerly the Military Selective Service Act of 1967, 62 Stat. 604, as amended, 50 U.S.C. (1970 ed.) App. 451 *et seq.*

[2]Respondents are represented by the Department of Justice pursuant to 38 U.S.C. (Supp. V) 2022.

against layoff) after accumulating 1040 days of experience at carman's work (Pet. App. 6a).

Upon being honorably discharged from military service, respondents were reinstated, see 38 U.S.C. (Supp. V) 2021(a), and resumed progress toward attainment of the 1040 days necessary to establish journeyman status. Prior to doing so, however, respondents were laid off because of lack of work (Pet. App. 7a). It was stipulated that if respondents had been continuously employed by Union Pacific during the time they spent in the military, they would have completed the 1040-day requirement and, as journeymen carmen, would not have been laid off (Pet. App. 7a-8a).[3]

Respondents argued in the district court that their layoffs violated 38 U.S.C (Supp. V) 2021(b)(2), which requires that a reinstated veteran be accorded the same seniority "as he would have enjoyed if [he] * * * had continued in [his] * * * employment continuously" rather than serving in the military. They contended that the 1040-day period was simply a period of time after which Rule 154 carmen were afforded additional layoff protection and benefits, and towards which a returning veteran should be automatically entitled to credit his time in the military service. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275. Petitioners contended that the 1040-day period is a period of substantive training, which respondents were required to satisfy as a prerequisite to "promotion" to journeymen. See *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 179.

[3]Petitioners' statement (Pet. 7) that the district court ordered reinstatement "without regard to the amount of working experience they had accumulated as Rule 154 carmen before entering the military" is incorrect. The district court took the total working experience of respondents into account in computing when they would have completed the 1040-day requirement, and it awarded back pay and seniority credit in the amount the parties stipulated as correct (Pet. App. 7a, 17a).

After "a careful evaluation of the facts under consideration," the district court reached "the inescapable conclusion that the change in status from Rule 154 carmen to Journeyman carmen is independent of any achievement of proficiency or employer discretion " (Pet. App. 15a-16a), and it entered judgment for respondents.

The court of appeals affirmed on the basis of the "well-reasoned opinion" of the district court, which the court of appeals found "supported by substantial evidence and * * * not induced by any erroneous view of the law" (Pet. App. 2a).[4]

2. Further review by this Court is unwarranted. The district court, on whose opinion we rely, properly held that the statute requires Union Pacific to give respondents seniority credit for the time they spent in military service. The result reached here is closely tied to the facts of this case, and there is no need for this Court to reexamine the factual inferences drawn by both lower courts.

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 284-285, this Court established the basic principle, now codified in 38 U.S.C. (Supp. V) 2021(b)(2), that the returning veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously" instead of entering the military service. The Court refined this principle in *Tilton* v. *Missouri Pacific R. Co.*, *supra*, 376 U.S. at 179, explaining that, although a returning veteran cannot claim a "promotion" that depends on training unless he actually completes the training, he is entitled to credit his military service toward an advance in status

[4]The court of appeals added that the district court's judgment was further supported by *Alabama Power Co.* v. *Davis*, 431 U.S. 581, decided after the district court's decision (Pet. App. 2a).

which "depends essentially [on continued] * * * employment." The courts of appeals have consistently interpreted *Tilton* as requiring a veteran to complete a training period in order to claim a promotion only if the particular training period is designed to develop increased skill and proficiency. See, *e.g., Hatton* v. *Tabard Press Corp.*, 406 F. 2d 593, 597-598 (C.A. 2); *United States ex rel. Adams* v. *General Motors Corp.*, 525 F. 2d 161, 165-166 (C.A. 6); *Hanna* v. *American Motors Corp.*, 557 F. 2d 118, 121 (C.A. 7). The district court was thus entirely correct in stating that the resolution of this case "turns upon whether the 1040 day [period] of work experience is a training period to promote the Rule 154 carmen's skill and proficiency after which they receive actual promotions to carmen or simply an arbitrary period of time, after the completion of which Rule 154 carmen receive seniority and additional layoff protection and benefits" (Pet. App. 10a).

Here, as in *Tilton*, the veterans returned from military service to find that workers who had been junior to them on the Rule 154 list had become senior to them on the journeyman list. Compare Pet. App. 7a-8a with *Tilton, supra*, 376 U.S. at 177. And here, as in *Tilton*, advancement was dependent not on "the exercise of management discretion" but rather depended "essentially [on continued] * * * employment." Compare Pet. App. 15a-16a with 376 U.S. at 179. As the courts below found after a "careful evaluation of the facts under consideration," journeyman status "is independent of any achievement of proficiency or employer discretion" (Pet. App. 15a-16a). The case is thus like *United States ex rel. Adams* v. *General Motors Corp., supra*, 525 F. 2d at 164-165, where "[i]f the plaintiffs had remained continuously employed in the E.I.T. program

[similar to the Rule 154 program] rather than entering upon military duty they would have achieved E.I.T.S. status before the reduction in forces caused them to be dropped from the program and, obviously, before any of the non-veterans who entered E.I.T. after their date of entrance. The only change in status effected by moving from E.I.T. to E.I.T.S. was that the employee gained additional protection from layoff." Here, by the same token, respondents gained only "additional protection from layoff"; it was stipulated that the achievement of journeyman status resulted in no increase in wages and no change in duties (Pet. 10a-11a). In other words, completion of the 1040 days did not lead to a promotion of any sort; it simply led to placement on a higher seniority ladder. Since two lower courts have concurred in this factual finding, further scrutiny by this Court is unwarranted. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397, 401 n. 2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

DOJ-1978-08